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Via email to: RulemakingProcessComment@deltacouncil.ca.gov

Comments on Section 5004 of the proposed regulations.

Section 5004 of the proposed regulations fails to implement the statutory duty of the Delta Stewardship Council to provide independent oversight of science and adaptive management in the Delta through the Independent Science Board, or to implement any procedure for review by the Delta Stewardship Council of the statutory requirements for incorporation of the Bay Delta Conservation Plan in the Delta Plan, prior to such incorporation. As such it would appear to impermissibly delegate essential duties of the Delta Stewardship Council to other agencies.

The following sections describe these statutory duties, and how Section 5004 fails to address them.

1. Independent Oversight of Science and Adaptive Management

SB 7x1 explicitly described the role of the Independent Science Board in oversight of scientific research, monitoring, and assessment programs that support adaptive management of the Delta:

(3) The Delta Independent Science Board shall provide oversight of the scientific research, monitoring, and assessment programs that support adaptive management of the Delta through periodic reviews of each of those programs that shall be scheduled to ensure that all Delta scientific research, monitoring, and assessment programs are reviewed at least once every four years.

(4) The Delta Independent Science Board shall submit to the council a report on the results of each review, including recommendations for any changes in the programs reviewed by the board.

(SB 7x1 Section 803504(a))

Instead, the proposed rules delegate oversight of science and adaptive management in the Delta to other state agencies proposing actions in the Delta:

§ 5004. Contents of Certifications of Consistency

....

(3) As relevant to the purpose and nature of the project, all covered actions must document use of best available science (as described in Appendix 1A);

(4) Ecosystem restoration and water management covered actions must include adequate provisions, appropriate to the scope of the covered action, to assure continued implementation of adaptive management. This requirement shall be satisfied through both of the following:

(A) An adaptive management plan that describes the approach to be taken consistent with the adaptive management framework in Appendix 1B; and

(B) Documentation of access to adequate resources and delineated authority by the entity responsible for the implementation of the proposed adaptive management process.

Appendix 1A of the proposed regulations, “Best Available Science,” does not even mention the Delta Independent Science Board. This appears contrary to the intent of the legislature.

With respect to Appendix 1B of the proposed regulations, “Adaptive Management,” there is no mention of the mandate in SB 7x1 to require the Bay Delta Conservation Plan to include fishery agencies in real-time decisionmaking about water system operations.

85321. The BDCP shall include a transparent, real-time operational decisionmaking process in which fishery agencies ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations.

Again, this appears contrary to the intent of the legislature.

2. Requirements for the Bay Delta Conservation Plan to be Incorporated into the Delta Plan

The proposed regulations fail not address the requirements in SB 7X1, Section 85320 for the Bay Delta Conservation Plan to be incorporated into the Delta Plan:

(b) The BDCP shall not be incorporated into the Delta Plan and the public benefits associated with the BDCP shall not be eligible for state funding, unless the BDCP does all of the following:

...

(2) Complies with Division 13 (commencing with Section 21000) of the

Public Resources Code, including a comprehensive review and analysis of all of the following:

(A) A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval of a natural community conservation plan as provided in subdivision (a) of Section 2820

of the Fish and Game Code, and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.

...

(C) The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the environmental impact report.

(D) The potential effects on migratory fish and aquatic resources.

...

(G) The potential effects of each Delta conveyance alternative on Delta water quality.

With respect to section (B), there have been numerous requests by the Environmental Water Caucus and its member organizations for the Delta Stewardship Council to require a water availability analysis before incorporating the Bay Delta Conservation Plan into the Delta Plan. There are no provisions in section 5004 to ensure that the Bay Delta Conservation Plan includes such an analysis prior to incorporation in the Delta Plan.¹

With respect to section (C), there are no provisions in section 5004 to ensure that the Bay Delta Conservation Plan includes a comprehensive review and analysis of the potential changes in precipitation and runoff due to climate change, prior to incorporation in the Delta Plan.²

With respect to section (G), there are no provisions in section 5004 to ensure that the Bay Delta Conservation Plan analyzes the effects of each conveyance alternative on Delta water quality. In addition, the Delta Plan does not continue the existing state policy of maintaining water quality in the Delta.³

¹ See also "Water Supply for Diversions in the Delta by the Central Valley Project and the State Water Project," California Water Research, October 2012. Available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/comments111312/deirdre_desjardins.pdf Incorporated by reference.

² See "Comments on the Delta Plan, climate change analysis in BDCP and the requirements of the Delta Reform Act," California Water Research. Submitted as comments on the Delta Plan RPEIR. Incorporated by reference.

³ See "Comments on Comments on the RPEIR, water quality recommendations, and piecemealing under CEQA," California Water Research. Submitted as comments on the Delta Plan RPEIR. Incorporated by reference.

These omissions could allow incorporation of the Bay Delta Conservation Plan into the Delta Plan, without it meeting the requirements. This is clearly contrary to the intent of the legislature in Section 85320. The statute says “the Bay Delta Conservation Plan shall not be incorporated into the Delta Plan.. unless the BDCP does all of the following.” Section 5004 of the draft regulations only states, “Inconsistency with this policy may be the basis for an appeal.” [emphasis added.]

The regulations must provide for adequate review of the Bay Delta Conservation Plan with respect to the requirements in section 85320, prior to incorporation in the Delta Plan.

Sincerely,

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